HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 556 (MS) of 2003

Ishtiyaque & others ..... Petitioners

Versus

State of Uttaranchal
& others ..... Respondents

Dated: 24.8.2004

Hon. Rajesh Tandon J.

Heard the learned counsel for the parties.

By the present writ petition the petitioner has prayed for a writ of certiorari quashing the order dated 26.7.2000 passed by the Civil Judge (JD) Haridwar and the order dated 16.5.2003 passed by the Addl. District Judge, Haridwar.

Briefly stated a civil suit was filed by the petitioner and the respondent no.4 to 9 being O.S. No. 348 of 1992 for declaration of the rights of the petitioner as well as respondent no.4 to 9 on a piece of land measuring 4 ½ Bigha recorded in revenue records as Khasra No. 168 and 169 situated in village Sakhpuri, Tehsil and District Haridwar. The piece of land is in possession of the plaintiff for the last 50 years and their names were recorded in Verg-4 in the revenue records. The said suit proceeded ex parte and the suit was decreed vide order dated 31.5.1993. After a lapse of five years restoration application was

filed accompanied with the application under Section 5 of the Limitation Act. The trial Court has set aside the ex parte decree and restored the suit vide order dated 26.7.2000. A revision was preferred and the same was also dismissed.

Both the courts below have found that the defendant was prevented by sufficient cause for absenting in the trial Court when the case has proceeded ex parte.

There are concurrent findings of the both courts below and there is no reason to interfere in the finding of the lower Courts under Article 226/227 of the Constitution of India in view of the observation made by the Apex Court in the case of Surya Devi Rai vs. Ram Chandra Rai (2003) 6 SCC 675. The observation are quoted below:

> *"We are of the opinion that the curtailment of revisional jurisdiction of the High Court does not take away – and could not have taken away – the constitutional jurisdiction of the High Court to issue a writ of certiorari to a civil court nor is the power of superintendence conferred on the High Court under Article 227 of the Constitution taken away or whittled down. The power exists, untrammeled by the amendment in Section 115 CPC, and is available to be exercised subject to rules of self-discipline and practice which are well settled.*
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> ***35.*** *We have carefully perused the Full Bench decision of the Allahabad High Court in Ganga Saran case1 relied on by the learned counsel for the respondent and referred to in the impugned order of the High Court. We do not think that the decision of the Full Bench has been correctly read. Rather vide para 11, the Full Bench has itself held that where the order of the civil court suffer from patent error of law and further causes manifest injustice to the party aggrieved. Then the same can be subjected to a writ of certiorari. The Full Bench added that every interlocutory order passed in a civil suit is not subject to review under Article 226 of the Constitution but if it is found from the order impugned that fundamental principle of law has been violated and further, such an order causes substantial injustice to the party aggrieved, the jurisdiction of the High Court to issue a writ of certiorari is not precluded. However the following sentence occurs in the judgment of the Full Bench: (AIR p. 119)*
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> > *"Where an aggrieved party approaches the High Court under Article 226 of the Constitution against an order passed in civil suit refusing to issue injunction to a private individual who is not under statutory duty to perform public duty or vacating an order of injunction, the main relief is for issue of a writ of mandamus to a private*

individual and such a writ petition under Article 226 of the Constitution would not be maintainable."

36. *It seems that the High Court in its decision impugned herein formed an impression from the abovequoted passage that a prayer for issuance of injunction having been refused by the trial court as well as the appellate court, both being subordinate to the High Court and the dispute being between two private parties, issuance of injunction by the High Court amounts to issuance of a mandamus against a private party, which is not permissible in law.*

37. *The abovequoted sentence from Ganga Saran case[1] cannot be read torn out of the context. All that the Full Bench has said is that while exercising certiorari jurisdiction over a decision of the court below refusing to issue an order of injunction, the High Court would not, while issuing a writ of certiorari, also issue a mandamus against a private party. Article 227 of the Constitution has not been referred to by the Full Bench. Earlier in this judgment we have already pointed out the distinction between Article 226 and Article 227 of the Constitution and we need not reiterate the same. In this context, we may quote the Constitution Bench decision in T.C. Basappa v. T. Nagappa6 and Province of Bombay v. Khushaldas S. Advani21 as also a three-Judge Bench decision in Dwarka Nath v. ITO22 which have held in no uncertain terms, as the law has always been, that writ of certiorari is issued against the acts or proceedings of a judicial or quasi-judicial body conferred with power to determine questions affecting the rights of subjects and obliged to act judicially. We are therefore of the opinion that he writ of certiorari is directed against the act, order or proceedings of the subordinate court, it can issue even if the lis is between two private parties.*

38. *Such like matters frequently arise before the High Courts. We sum our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:*

(1) Amendment by Act 46 of 1999 with effect from 1-7-2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correction gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction – by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction – by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no

procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation o revaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annual or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide

the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

However, respondent shall cooperate with the hearing of the suit. The injunction order in favour of the plaintiff shall remain operative till the disposal of the suit.

(Rajesh Tandon J.)

24.8.2004
*Dhyani